In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-732

KFC NATIONAL MANAGEMENT COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The court of appeals entered no opinion in summarily enforcing the Board's supplemental order (Pet. App. 2a). The Board's supplemental decision and order (Pet. App. 3a-12a) are reported at 214 NLRB No. 29. The initial opinion of the court of appeals is reported at 497 F.2d 298. The Board's initial decision and order are reported at 204 NLRB 630.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1975, and the Company's petition for rehearing was denied on August 20, 1975 (Pet. App. 1a). The petition for a writ of certiorari was filed on November 18, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employer may refuse to bargain with a certified bargaining representative and request a new election on the ground that the union may have lost its majority status through employee turnover which occurred while the validity of the first election was being litigated.

STATUTE INVOLVED

Section 8 of the National Labor Relations Act, as amended (61 Stat. 140, 73 Stat. 525, 29 U.S.C. 158), provides in pertinent part:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

The Union[1] filed a petition in August, 1971, for an election among the employees at twelve of the Company's retail stores in Connecticut and Western Massachusetts. The election was held on October 15, 1971, with 87 of the approximately 101 eligible employees casting ballots. There were 37 votes for and 41 votes against Union representation; in addition, there were nine challenged ballots (A. 3).[2]

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[1]Bartenders, Hotel, Motel, Cafeteria and Restaurant Employees Union, Local 116, AFL-CIO.

[2]"A." refers to the Appendix to the parties' briefs in the court of appeals. A copy has been lodged with the Clerk of this Court.

The Union filed objections to the election, alleging that Company supervisors had coerced employees to vote against the Union and had granted increases in benefits to discourage Union support (A. 4). Following a hearing, the Hearing Officer sustained the Union's objections and recommended that the election be set aside and a new election held. When the Company withdrew its exceptions to the Hearing Officer's report, the Regional Director adopted the Hearing Officer's recommendations and directed a second election (A. 4).

At the second election, held on June 16, 1972, 54 of the approximately 96 eligible voters cast ballots. There were 34 votes for and 20 votes against Union representation (A. 14). The Company filed objections to the election, alleging that the results were not representative of the bargaining unit and that employees were coerced into voting for the Union by the improper conduct of a supervisor. The Company requested a hearing on the objections (A. 7-8).

After investigation, the Regional Director overruled the objections, finding a hearing unnecessary since no material or substantial factual issues existed, and certified the Union as the bargaining representative (A. 14-22). The Company requested Board review of the Regional Director's decision (A. 23-24). The Board denied the request and the Company's subsequent motion for reconsideration (A. 35, 40).

When the Company refused to bargain, the Regional Director issued an unfair labor practices complaint (A. 77). The Company's answer denied the commission of unfair labor practices and challenged the validity of the Union's certification (A. 49). In response to the Board's General Counsel's motion for summary judgment (A. 78), the Company alleged, *inter alia*, that the Board had failed to follow

the statutorily prescribed procedure of having three Board members consider its request for review and reconsideration (A. 67).[3]

The Board granted the General Counsel's motion, finding that the Company failed to allege any special circumstances which would require the Board to reexamine the decision in the representation proceeding (A. 79-82). The Board ruled that the Company's refusal to bargain had violated Section 8(a)(5) and (1) of the Act and ordered the Company to bargain with the Union upon request (A. 87-89).

On the Company's petition for review of the Board's order (A. 92), the court of appeals remanded the case to the Board because of the irregularity in the procedure by which the agency had denied review of the Regional Director's decision. *KFC National Management Corp. v. National Labor Relations Board*, 497 F.2d 298 (C.A. 2). The court said: "We hold no more than that the general proxies issued by the Board members to those not legally responsible for the review of representation decisions were invalid under both the statutory requirements of the National Labor Relations Act and the fundamental concepts of administrative due process" (497 F.2d at 306). With respect to the Company's objections to the election, the court commented: "While the Regional Director's opinion may well be persuasive on petitioner's underlying claims, we cannot say that one who seeks full Board review in even such a case is clearly acting in bad faith, so as to constitute a refusal to bargain" (*id.* at 307, n. 15).

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[3]The Company's request for review and motion for reconsideration was considered by one Board Member and the legal assistants to two other Board Members, each authorized to cast votes for the member. The Board Member and the two staff assistants voted unanimously to deny the request for review and the motion for reconsideration (497 F.2d at 301).

On the remand, the Company submitted a response to supplement its request for review of the Regional Director's decision certifying the Union. A three-member panel of the Board, after reconsidering the Company's request for review, ruled that the Company's request did not raise substantial issues warranting review of the Regional Director's decision, reaffirmed the original decision that the Company had violated the Act by refusing to bargain with the Union, and issued a bargaining order. The Board rejected the Company's contention that a new election should be held because of employee turnover that had occurred since the previous election (Pet. App. 3a-12a.)

The court of appeals summarily enforced the Board's supplemental order (Pet. App. 2a).

ARGUMENT

1. The principal issue presented is whether an employer may refuse to bargain with a certified bargaining representative and request a new election on the ground that the union may have lost its majority while the validity of the first election was being litigated. However, this Court held in *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 104, that barring unusual circumstances a union's majority status may not be questioned during the year following the union's certification. The holding of *Brooks* was not undermined, as petitioner suggests (Pet. 8-9), by this Court's subsequent decision in *National Labor Relations Board* v. *Burns Security Services*, 406 U.S. 272. Indeed, in *Burns Security* the Court again stated that "[w]here an employer remains the same, a Board certification carries with it an almost conclusive presumption that the majority representative status of the union continues for a reasonable time, usually a year" (406 U.S. at 279, n. 3).

The certification year has never begun to run in this case, since it does not commence until the employer begins to bargain in good faith, and here the Company has consistently refused to bargain with the Union. Furthermore, employee turnover, by itself, is not an "unusual circumstance" within the meaning of *Brooks*, which overcomes the presumption of the union's majority status during the certification year. *National Labor Relations Board* v. *Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1091 (C.A. 8), and cases there cited.

Moreover, this Court has ruled that a union's loss of majority status during delays due to litigation does not terminate the employer's obligation to bargain with the union. As the Court said in *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702, 705: "[P]rocedural delays necessary fairly to determine charges of unfair labor practices might in this way be made the occasion for further procedural delays in connection with repeated requests for elections, thus providing employers a chance to profit from a stubborn refusal to abide by the law." See also *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 748, n. 16; *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 610-611.

In this case, the Union demonstrated its majority status three and one-half years ago by winning an election among the Company's employees. The time since the election has been consumed in processing the Company's objections to the election and the unfair labor practice charges brought against the Company because of its continuing refusal to bargain with the Union. In such a situation, the Company cannot assert the possibility of employee turnover during the process of litigation—which litigation the Company initiated in order to contest the election won by the Union—as a justification for refusing

to bargain with the Union and demanding a new election.[4]

2. Petitioner also challenges the court of appeals' summary enforcement without explanation of the Board's supplemental order. In light of the established authority cited herein, however, the court of appeals properly so acted because the Company's contentions were clearly without merit. See *National Labor Relations Board* v. *Amalgamated Clothing Workers*, 430 F.2d 966 (C.A. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JANUARY 1976.

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[4]Petitioner cites (Pet. 8, n. 10) *National Labor Relations Board* v. *H.P. Hood, Inc.*, 496 F.2d 515 (C.A. 1), in which the First Circuit remanded the case to the Board for a determination of whether the petition for enforcement should be granted in view of a delay of 5½ years which could not be attributed to the employer's tactics. However, the First Circuit, in an unreported decision, subsequently enforced the Board's order in that case. *National Labor Relations Board* v. *H.P. Hood, Inc.*, No. 73-1334, decided July 3, 1974.

Petitioner also relies upon *Clark's Gamble Corp.* v. *National Labor Relations Board*, 407 F.2d 199 (C.A. 6). However, as the Sixth Circuit later explained (422 F.2d 845, 846-847), that decision rested on the fact that there was a two-year delay between the filing of the charge and the Board's decision which "was not occasioned by procrastination or delaying tactics on the part of the respondent, but rather by the Board and its employee." No similar Board delay occurred here.